IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

KANAUTICA ZAYRE-BROWN, Plaintiff, v. NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION, *et al.*, Defendants.	No. 3:22-cv-191

PLAINTIFF'S BRIEF IN SUPPORT OF HER MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Kanautica Zayre-Brown is an incarcerated, transgender woman. Defendants are the state prison system[1] and prison administrators charged with her care. The parties agree that Plaintiff suffers from gender dysphoria and continues to experience clinically significant symptoms of this condition. These include severe anxiety, depression, and thoughts of self-mutilation and suicide.

Plaintiff's treatment so far has included psychotherapy, social transitioning, hormone therapy, and, before her incarceration, gender-affirming surgery including removal of the testes. Though important, that treatment has not meaningfully alleviated her gender dysphoria. Plaintiff continues to suffer. Under the authoritative standard of medical care—recognized as such by the Fourth Circuit in *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020)—the only possible next step in treating her condition is vulvoplasty or vaginoplasty. Defendants' healthcare providers agree that this surgery is medically necessary for Plaintiff. And Defendants' own expert psychologist testified that gender-affirming surgery is necessary to treat Plaintiff's gender dysphoria. (Ex. 1, Boyd Dep. 167:12-21.)

But Defendants continue to deny Plaintiff surgery. Why? Not because they reached a different conclusion based on expertise in gender-affirming care—they

[1] Most of the facts herein took place while the North Carolina Department of Public Safety (DPS) still housed the state's prison system. Due to a recent re-organization, those operations are now housed under the NC Department of Adult Correction (DAC), which has been substituted for DPS as a party to this action. Plaintiff uses DAC throughout this brief to reflect this substitution. While exhibits and deposition testimony may refer to DPS rather than DAC, the terminology is used synonymously.

have none. Not because Defendants think Plaintiff does not meet the clinical criteria for surgery—she unquestionably does. And not because Defendants are worried about security, cost, administrative issues, or anything of the sort.

Rather, the only reasons Defendants consider gender-affirming surgery unnecessary are because Plaintiff is "stable" and "resilient," and in their view, the risks of surgery outweigh the benefits. Those reasons, however, are no reasons at all. To qualify for gender-affirming surgery, a patient *must* be mentally stable. And Defendants cannot identify any risks specific to Plaintiff that make this commonly provided surgery particularly dangerous for her.

Accordingly, when examining this profoundly one-sided record, Plaintiff is entitled to summary judgment on her Eighth Amendment claim for injunctive relief. As explained below, Plaintiff also is entitled to summary judgment on her ADA and state constitutional claims.

STATEMENT OF FACTS

A. Mrs. Zayre-Brown's History of Gender Dysphoria

Mrs. Zayre-Brown is a transgender woman; her female gender identity, which is the sex she knows herself to be, differs from the male sex assigned to her at birth. (First Zayre-Brown Dec., DE 13-2, ¶2; Ex. 2, Ettner Rep. ¶18.) Mrs. Zayre-Brown has recognized herself as female since childhood. (First Zayre-Brown Dec. ¶2.) She began socially transitioning and was diagnosed with gender dysphoria in 2010. (*Id.* ¶9.)

Gender dysphoria is a serious medical condition characterized by (1) a marked incongruence between an individual's sex assigned at birth and the individual's gender identity, (2) strong cross-gender identification, and (3) clinically significant

distress or impairment of functioning. (Ettner Rep. ¶¶19, 23.) Gender dysphoria is a medical condition recognized by the American Psychiatric Association and listed in the DSM-V and the World Health Organization's International Classification of Diseases-10. (*Id.* ¶¶21-22.) Like many medical conditions, gender dysphoria can be ameliorated or cured through treatment. *(Id.* ¶30.)

Soon after Mrs. Zayre-Brown received her gender dysphoria diagnosis, she began psychotherapy as part of her treatment. (First Zayre-Brown Dec. ¶9; Ex. 3, Zayre-Brown Dep. 32:3-21.) In 2012, with the support of her psychologist, Mrs. Zayre-Brown began gender-affirming hormone therapy under the care of an endocrinologist. (First Zayre-Brown Dec. ¶10; Zayre-Brown Dep. 33:4-34:25.) Mrs. Zayre-Brown saw hormone therapy as the first step toward her goal of aligning her body with her gender identity. (*Id.*, 34:23-36:20.) In the same year, she legally changed her name to "Kanautica Promises Zayre," to align with her female identity. (First Zayre-Brown Dec. ¶11.)[2]

Mrs. Zayre-Brown understood the limitations of hormone therapy and felt a sense of urgency to "physically align [her] body with [her] gender" due to the pain from having a stereotypically male body. (*Id.* ¶12; Zayre-Brown Dep. 36:21-38:21, 40:12-21.) From 2012 to 2014, Mrs. Zayre-Brown had gender-affirming mammoplasty and body contouring. (First Zayre-Brown Dec. ¶13; Zayre-Brown Dep. 42:4-45:15, 50:25-52:17, 53:9-25, 56:1-21.) Although these procedures alleviated her dysphoria

[2] Plaintiff "began going by Kanautica Zayre-Brown in 2014, after marrying her long-time partner, Dionne Brown." (First Zayre-Brown Dec. ¶11

somewhat by giving her body a more feminine shape, Mrs. Zayre-Brown was still self-conscious and dysphoric about her lower body, altering her clothing and avoiding certain activities like sports and dancing as a result. (Zayre-Brown Dep. 49:8-50:24.) In 2017, Mrs. Zayre-Brown underwent facial feminization surgery and gender-affirming orchiectomy (surgical removal of testicles). (First Zayre-Brown Dec. ¶15; Zayre-Brown Dep. 60:18-61:5.) The orchiectomy was performed as a first step toward later gender-affirming genital surgery. (*Id.*; Ettner Rep., App. E, 1, 4; Zayre-Brown Dep. 66:19-67:23.) Mrs. Zayre-Brown was informed that, given the piecemeal nature of her genital surgery, her orchiectomy likely would not significantly alleviate her dysphoria. (Zayre-Brown Dep. 66:19-67:23.)

But for financial limitations, Mrs. Zayre-Brown would have undergone gender-affirming genital surgery along with her orchiectomy. (First Zayre-Brown Dec. ¶15; Zayre-Brown Dep. 54:10-55:6.) But she was incarcerated in 2017 before she could complete her surgical treatment. (First Zayre-Brown Dec. ¶16.)

B. Standard of Care for Treatment of Gender Dysphoria

The World Professional Association for Transgender Health ("WPATH") publishes internationally accepted Standards of Care ("SOC") for treating gender dysphoria. (Ettner Rep. ¶30.) The SOC set forth "clinical guidelines" for gender-affirming medical interventions. (Ex. 4, WPATH SOC 7 at 2.) The current SOC, published in 2022 as version 8, are the prevailing guidelines for medical professionals

treating gender dysphoria. (Ettner Rep. ¶30.)[3] The Fourth Circuit has observed that the SOC "represent the consensus approach of the medical and mental health community. . . and have been recognized by various courts, including this one, as the authoritative standards of care" in both carceral and non-carceral settings. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020) (citing *De'lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013). (*See also* Ettner Rep. ¶30.)

The American Medical Association, the Endocrine Society, the American Psychological Association, the American Psychiatric Association, the World Health Organization, the American Academy of Family Physicians, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, and the American Society of Plastic Surgeons all endorse treatment protocols in accordance with the SOC. (*Id.*) "There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups." *Grimm*, 972 F.3d at 595-96.[4]

The SOC establish treatment guidelines tailored to the needs of the individual patient. (Ettner Rep. ¶¶32, 35.) Treatments for gender dysphoria include social transition, psychotherapy, gender-affirming hormone therapy, and gender-affirming medical procedures and surgeries to align an individual's primary and/or secondary

[3] The 7th version of the SOC was in effect during most of the period relevant to Mrs. Zayre-Brown's treatment by Defendants. Dr. Ettner's opinions regarding the 7th version of the SOC remain equally applicable to the 8th. (Ettner Rep. ¶31.)
[4] Defendants also admit to referencing the WPATH SOC in their policy development and practice. (Peiper Dep. 124:3-10; Peiper 30(b)(6) Dep. 201:13-17; Campbell 30(b)(6) Dep. 90:12-93:2.)

sexual characteristics with their gender identity. (*Id.* ¶32.) Transgender women who have undergone orchiectomy and therefore cannot produce their own hormones require consistent hormone therapy at appropriate levels to avoid adverse health effects. (*Id.* ¶47.)

The SOC also acknowledge that hormone therapy may be insufficient in some cases, and that for these individuals "relief from gender dysphoria cannot be achieved without modification of their . . . sex characteristics to establish greater congruence with their gender identity." (*Id.* ¶48.) WPATH has noted that for some, gender-affirming surgery is "the **only** effective treatment for the condition, and for some people genital surgery is essential and life-saving." (*Id.* ¶48 n.2.) To qualify for gender-affirming surgery under the SOC, an individual must be psychologically stable, with any comorbid mental health conditions well-controlled. (WPATH SOC 7 at 105-06.)

Many major health insurance companies, including Blue Cross Blue shield of North Carolina, cover gender-affirming surgery and reference the WPATH SOC. (Ettner Rep. ¶108). Additionally, the North Carolina State Employees Health Plan now covers the cost of gender-affirming surgery, after a federal court found that that its failure to do so was unconstitutional. (*Id.* ¶110); *see Kadell v. Folwell*, 620 F. Supp. 3d 339, 374-81, 392 (M.D.N.C. 2022).

C. Defendants' Policies and Practices for Treating Gender Dysphoria

DAC policy instructs clinicians to provide "services that are consistent with standards of care or community practice" and that prisoners "should receive the exact same care they would get if they were on the outside." (Ex. 5, Campbell 30(b)(6) Dep.

18:9-19:23, 51:19-2; Ex. 6, Health and Wellness Services Organization Policy at 1.) "Community consistent" care is considered generally synonymous with medically necessary care. (Campbell 30(b)(6) Dep. 21:12-15.) DAC generally considers professional medical associations and organizations to be reliable and instructs its clinicians to look to these groups' clinical practice guidelines for the appropriate standard of care. (*Id.*, 28:4-29:1, 35:1-10, 51:5-16.) DAC considers these guidelines an appropriate starting point for an evidence-based analysis of medical necessity in the prison setting. (*Id.*, 35:1-10, 52:22-54:10.)

Utilization Management ("UM") is responsible for making medical necessity determinations and approving treatment prescribed by DAC providers through Utilization Requests ("URs") for all conditions other than gender dysphoria. (Campbell 30(b)(6) Dep. 40:15-41:10, 62:15-22; Ex. 7, Utilization Management Policy at 1-2.) All UM reviewers are medical professionals of some kind, and most approval determinations must be made by UM reviewer physicians. (Campbell 30(b)(6) Dep. 41:22-43:9) In addition to clinical practice guidelines, a treating physician's prescription or recommendation is considered "critical" to the determination of medical necessity by UM. (Campbell 30(b)(6) Dep. 41:11-21.)

URs can either be approved, pended—meaning that the submitted request has been sent to the review authority for consideration—or deferred. (*Id.*, 74:16-75:7.) A deferral might mean that additional information is required or that a UR request has been effectively denied. (*Id.*, 75:4-10.) DAC is unaware of any circumstance in which an outside specialist and direct care provider both recommended a procedure in line

with DAC's recommended medical necessity analysis where that procedure was not subsequently approved by UM. (*Id.*, 77:24-78:25.)

The current DAC Evaluation & Management of Transgender Offenders Policy ("EMTO Policy") requires that requests for medical treatment of gender dysphoria, including hormone therapy and gender-affirming surgery, be considered by a multidisciplinary committee known as the Division Transgender Accommodation Review Committee ("DTARC").[5] (EMTO Policy, DE 10-1.) Unlike all other health conditions, DTARC is considered the Utilization Review authority for gender dysphoria. (Campbell 30(b)(6) Dep. 62:15-22.)

The DTARC must include, "at a minimum, the Medical Director, Chief of Psychiatry, Behavioral Health Director, Director of Rehabilitative Services, and the [Prison Rape Elimination Act] ("PREA") Director." (EMTO Policy at 2.) Defendant Arthur Campbell is the Medical Director, Brian Sheitman is the Chief of Psychiatry, Jonathan Peiper is the Behavioral Health Director, and Charlotte Williams is the PREA Director. Also on the DTARC are Defendants Valerie Langley, the Director of Nursing; Abhay Agarwal, the Deputy Medical Director; Sarah Cobb, the Director of Rehabilitative Services; and Josh Panter, the Director of Operations. Defendant Terri Catlett was on the DTARC as the Director of Healthcare Administration when Mrs. Zayre-Brown's requests for gender-affirming surgery were under review. (Ex. 8,

[5] Hormone therapy and gender-affirming surgery are considered "Non-Routine Accommodations" under the EMTO Policy. Routine accommodations which include items such as clothing and toiletries are handled by each prison's Facility Transgender Accommodation Review Committee ("FTARC"). ((EMTO Policy, DE 10-1.

Catlett Dep. 12:12-14, 16:21.)

Defendants Cobb, Panter, Catlett, and Williams are not medical professionals and have no experience treating gender dysphoria. (Ex. 9, Defs. Interrog. Resps. at 7-9; Ex. 10, Junker Dep. 84:3-24; Catlett Dep. 11:11-20, 12:6-7, 12:19-13:6.) Dr. Campbell has never directly treated a patient seeking gender-affirming care for gender dysphoria (Ex. 11, Campbell Dep. 5:17-6:23, 7:22-10:12), and otherwise has limited training regarding the treatment of gender dysphoria. (*Id.,* 10:13-11:23, 13:4-14:2.) Dr. Peiper had only limited experience treating individuals diagnosed with gender dysphoria before joining DAC and does not provide any direct clinical services in his current role. (Ex. 12, Peiper 30(b)(6) Dep. 25:22-27:9, 29:22-24.) Dr. Sheitman's experience treating individuals seeking gender-affirming surgery is limited to addressing psychiatric comorbidities, primarily in emergency room and outpatient settings, rather than addressing the need for surgery. (Ex. 13, Sheitman Dep. 14:15-18-17:2-6.)

Under the EMTO policy, DTARC makes recommendations regarding surgeries to the Assistant Commissioner of Prisons—at the relevant times in this case, Defendant Harris—and the Director of Health and Wellness Services—at the relevant times in this case, Defendant Junker—for final determinations. (EMTO Policy at 7.) There is no other medical procedure for which DAC requires such high-level approval. (Peiper 30(b)(6) Dep. 105:13-24; Sheitman Dep. 26:11-16, 27:2-8.)

Harris is a prison administrator, not a healthcare provider of any kind. (Ex. 14, Harris Dep. 10:3-17:7.) She has limited knowledge of gender dysphoria—when

asked what a patient "might experience as a result of their gender dysphoria," Harris did not know. (*Id.*, 9:21-24). Although Junker is a mental health professional, he has no experience or training in directly treating gender dysphoria. (Junker Dep. 14-23.) Junker and Harris defer entirely to DTARC on recommendations concerning gender-affirming surgery. (*Id*. 229:13-18; Harris Dep. 77:6-9, 78:12-16.)[6]

UM has approved, and DAC has provided, surgeries that could be considered gender-affirming surgeries—such as mammoplasty, hysterectomy, and gonadectomy—whenever medically indicated for treatment of conditions other than gender dysphoria. (Campbell 30(b)(6) Dep. 144:2-19.) By contrast, DTARC has never approved, and DAC has never provided, gender-affirming surgery for the treatment of gender dysphoria. (*Id.,* 135:18-136:10; Peiper 30(b)(6) Dep. 96:13-16; Sheitman Dep. 106:11-13.)

D. Defendants' Lengthy Delays and Ongoing Refusal to Provide Plaintiff Medically Necessary Treatment

DAC psychologist Susan Garvey evaluated Mrs. Zayre-Brown and confirmed her gender dysphoria diagnosis when she entered DAC custody. (First Zayre-Brown Dec. ¶18; Ettner Rep., App. D, 1-3.)[7] DAC staff—including Defendant Junker—knew that Mrs. Zayre-Brown made an informal request for gender-affirming surgery to treat her gender dysphoria as early as November 27, 2017. (Ettner Rep., App. D, 4-5;

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[6] In addition to DTARC review, gender dysphoria medical procedures must be approved by Utilization Management—however, UM reviewers defer to DTARC decisions as approved under the EMTO policy. (Campbell 30(b)(6) Dep. 101:21-102:25.)

[7] Defendants have never disputed Mrs. Zayre-Brown's gender dysphoria diagnosis. (Peiper Dep. 46:9-10, 46:25-47:4, 47:24-48:4, 66:14, 66:21-22; Sheitman Dep. 89:22-25.)

Junker Dep. 65:19-24.)[8] In December 2018, Mrs. Zayre-Brown submitted a formal request for gender-affirming surgery to Harnett Correctional Institution's FTARC. (First Zayre-Brown Dec. ¶23.) In January 2019, Dr. Umesi evaluated Mrs. Zayre-Brown for gender-affirming surgery. *(Id.* ¶24; Ettner Rep., App. E, 1-4.) Following that encounter, he submitted a UR request for Mrs. Zayre-Brown, stating that her previous surgeries had been performed according to the WPATH SOC. *(Id.* at 4.)

In January 2019, Harnett FTARC referred Mrs. Zayre-Brown's request to DTARC, along with their recommendation against gender-affirming surgery. (Ettner Rep., App. F, 1; First Zayre-Brown Dec. ¶¶24-25.) Following the referral, Mrs. Zayre-Brown made repeated inquiries about the status of her request and expressed her worsening mental and emotional distress to DAC healthcare providers. (*Id.* ¶¶25-26.)

While DTARC review was pending, Mrs. Zayre-Brown began experiencing extreme distress related to her gender dysphoria and DTARC's continued delays. (*Id.* ¶29.) On August 6, 2019, while in protective custody awaiting transfer to Anson Correctional Institution ("Anson"), Mrs. Zayre-Brown's mental and emotional health deteriorated so badly that she was vomiting, crying, and barely able to speak. (*Id.*) She was taken to a local emergency room and placed on suicide watch. (*Id.*)

On August 15, 2019, Mrs. Zayre-Brown was transferred to Anson. (*Id.* ¶22.) On August 21, DTARC again deferred Mrs. Zayre-Brown's request for gender-affirming

[8] At the same time, Mrs. Zayre-Brown also requested resumption of her hormone therapy. (Ettner Rep., App. D, 4-5; Zayre-Brown Dec. ¶20.) Despite repeated follow-ups, she did not receive a prescription for hormone therapy until late June 2018. (*Id.* ¶21.)

surgery. (*Id.* ¶30; Ettner Rep., App. F, 2.) DTARC's decision falsely asserted that Mrs. Zayre-Brown had "successfully completed gender reassignment surgically," that "[v]aginoplasty is an elective procedure which is not medically necessary for reassignment," and that "[c]urrent staffing and resources does [sic] not allow for the proper post-operative care of this procedure." (*Id.*)

Defendant Junker participated in this process in his previous capacity as Behavioral Health Director and disagreed with the conclusions that Mrs. Zayre-Brown had successfully completed gender reassignment or that gender-affirming surgery should be denied for that reason. (Junker Dep. 88:5-90:12, 100:19-101:20, 105:6-106:12.) Junker has stated that Mrs. Zayre-Brown's request was deferred rather than outright denied as a compromise based on his disagreement. (*Id.* 102:15-103:25.)

Mrs. Zayre-Brown fully grieved this deferral by January 2, 2020, and ultimately submitted a request for re-consideration to DTARC two weeks after her grievances were denied. (First Zayre-Brown Dec. ¶¶30-31.) Five months later, DTARC's report stated that no determination would be made until after "an in-person consultation with an OBGYN surgical specialist with experience in gender-affirming surgery." (*Id.*; Ettner Rep., App. F, 3.)

In December 2020, still waiting on this surgical consult, Mrs. Zayre-Brown was admitted to an inpatient mental health facility at the recommendation of DAC provider Dr. Patricia Hahn, after Mrs. Zayre-Brown expressed an urge to mutilate her genitals and experienced suicidal thoughts following an altercation with another

prisoner who commented on Mrs. Zayre-Brown's genitals. (Ex. 15, Hahn Dep. 167:23-170:25, Zayre-Brown Dep. 166:18-170:16.) At that point, Mrs. Zayre-Brown had been requesting gender-affirming surgery for more than three years. She returned to Anson in early January 2021.

In February 2021, Mrs. Zayre-Brown filed an emergency grievance because she had not had a hormone therapy maintenance appointment since July 2020—over 6-1/2 months earlier—and her mental health was again deteriorating because of her inadequately treated gender dysphoria. (Zayre-Brown Dec. ¶34.) Mrs. Zayre-Brown never received a response to her emergency grievance. (*Id.*)

From March through early May 2021, Mrs. Zayre-Brown became increasingly distressed. She began to experience thoughts of self-harm more frequently as a result of her gender dysphoria and receiving no information regarding her requests for care. In March 2021, Mrs. Zayre-Brown was placed on an increased dose of Zoloft for the depression she was experiencing from her gender dysphoria. (Hahn Dep. 180:19-181:10.) In April 2021, Mrs. Zayre-Brown arrived at a mental health encounter with Dr. Hahn with a band tied around her genitals, which Dr. Hahn believed was an attempt, motivated by her gender dysphoria, to harm her genitals to obtain surgery faster. (*Id.* 181:18-183:10.) Mrs. Zayre-Brown testified that this was one of three or four occasions that she engaged in such self-harm efforts. (Zayre-Brown Dep. 171:1-174:13.) In May 2021, Catlett forwarded an email to DAC mental health staff stating that Mrs. Zayre-Brown had voiced to her family desires to commit suicide and engage in self-mutilation. (Catlett Dep. 59:8-16.)

On May 25, 2021, after numerous delays in coordination, Mrs. Zayre-Brown finally had a telehealth interview with the UNC Transgender Health Program Coordinator, Nurse Katherine Croft. (Zayre-Brown Dec. ¶35; Ex. 16, Croft Dec. ¶¶8-14 & Ex. A thereto.) Nurse Croft educated Mrs. Zayre-Brown on her surgical options and concluded, based on Mrs. Zayre-Brown's medical history, that there were no obstacles to surgery aside from minor weight loss. Nurse Croft communicated with DAC that an in-person consultation was the next step. (*Id.* ¶¶14-15.)

On July 12, 2021, Mrs. Zayre-Brown had the long-awaited in-person consultation for gender-affirming surgery with Dr. Bradley Figler, a UNC surgeon with considerable expertise in vulvoplasty and vaginoplasty, selected by DAC. (First Zayre-Brown Dec. ¶37; Ettner Rep., App. E, 5-11; Ex. 17, Figler Dec. ¶¶3,6-7). Dr. Figler evaluated Mrs. Zayre-Brown and concluded that she met the SOC requirements for gender-affirming genital surgery. (*Id.* ¶¶9-10.) Dr. Figler discussed surgical treatment options with Mrs. Zayre-Brown and together they decided on a treatment plan for gender-affirming vulvoplasty after some weight loss. *(Id.* ¶¶13-14.) Dr. Figler concluded that, based on her persistent gender dysphoria, gender-affirming surgery was medically necessary for her. (*Id.* ¶¶10-11.) He considers this intervention "necessary to cure or provide significant improvement of the patient's medical problem, and end or significantly diminish the pain and suffering that problem is causing." (*Id.* ¶11.) Dr. Figler believes "[t]his was particularly true for Mrs. Zayre-Brown because she had already socially transitioned and received all other endocrinological and surgical treatments without elimination of her gender

dysphoria." *(Id.)*

The UNC Transgender Health Program "was prepared to schedule and provide vulvoplasty for Mrs. Zayre-Brown once [DAC] approved her receiving such surgery" based on their conclusion that the surgery was medically necessary for her, but despite extensive follow-up, the program was never informed by anyone at DAC whether Mrs. Zayre-Brown would receive the surgery. (Croft Dec. ¶¶17-26.)

The UNC endocrinologist to whom Defendants sent Mrs. Zayre-Brown for hormone therapy, Dr. Donald Caraccio, also concluded that gender-affirming surgery was medically necessary, as reflected in the notes of his clinical encounters with her on October 21, 2021, and March 17, 2022; he has no reason to believe this is no longer the case. (Ex. 18, Caraccio Dec. ¶¶10, 14-23; Ettner Rep., App. E, 3, 14-17.) The social worker Defendants hired to provide mental health care to Mrs. Zayre Brown at DAC, Jennifer Dula, likewise has stated that it is her "clinical opinion that vulvoplasty will help Mrs. Zayre-Brown make significant progress in further treatment of her gender dysphoria and is medically necessary for her." (Ex. 19, Dula Dec. ¶13.)[9]

In early September 2021, Mrs. Zayre-Brown met the recommended weight loss goal. (First Zayre-Brown Decl. ¶37.) Her DAC healthcare providers submitted a UR request to schedule gender-affirming surgery. (*Id.* ¶37; Ettner Rep., App. F, 5.) On September 8, 2021, DAC provider Dr. Elton Amos deferred the request with a cursory

[9] Ms. Dula similarly wrote in a DAC October 20, 2021, Transgender Accommodation Summary: "[I]t appears the next appropriate step for Mrs. Brown is to undergo trans-feminine bottom surgery . . . Mrs. Brown has met the WPATH criteria and is an appropriate candidate for surgery." (Dula Dec. ¶14; Ettner Rep., App. E. 12.)

notation: "ELECTIVE PROCEDURES NOT APPROVED." (First Zayre-Brown Dec. ¶38; Ettner Rep., App. F, 5.) As Mrs. Zayre-Brown waited for additional information regarding her request in the fall and winter of 2021, she continued to voice a desire to self-harm to DAC medical providers. (Ex. 20, Sept. 16, 2021 Medical Records; Ex. 21, Nov. 2, 2021 Medical Records.)

E. Defendants Deny Plaintiff's Second Request for Surgery

On February 17, 2022, DTARC met to consider Mrs. Zayre-Brown's request for gender-affirming surgery. Of the DTARC members, only Defendants Campbell, Peiper, and Sheitman reviewed Mrs. Zayre-Brown's medical records before the DTARC meeting, and through this review they learned of Mrs. Zayre-Brown's previous instances of suicidal thoughts and self-injury behavior. (Campbell 30(b)(6) Dep. 148:11-150:13.) They were additionally aware of the recommendations and perspectives of Dr. Figler, Dr. Caraccio, and Ms. Dula. (*Id.* 169:17-175:8.) At the meeting, only Campbell, Peiper, and Sheitman provided input regarding health considerations. (Campbell 30(b)(6) Dep. 146:4-148:10; Ex. 22, Peiper Dep. 97:23-98:25, 127:2-9, 144:23-145:1; Sheitman Dep. 27:23-30:21; Defs.' Interrog. Resps. at 7-9.) None of them has ever met or spoken with Mrs. Zayre-Brown. (Peiper Dep. 62:11-17; Sheitman Dep. 46:12-15; Campbell 87:20-88:3.)

DTARC decided to recommend denial of Mrs. Zayre-Brown's request for gender-affirming surgery as not medically necessary. (Ettner Rep. App. F at 6-8, App. G; Campbell 30(b)(6) Dep. 193:9-14, Peiper 30(b)(6) Dep. 107:18-119:4.) The non-medical members of DTARC deferred to Campbell, Peiper, and Sheitman regarding the decision. (Catlett Dep. 47:7-15; Peiper Dep. 103:20-105:7.) In turn, Peiper and

Sheitman deferred to Campbell as Medical Director regarding medical necessity. (Peiper Dep. 116:1-20; Sheitman Dep. 131:7-18.)

DTARC's analysis was set out in a Case Summary prepared in the weeks following the February 17 meeting. It would ultimately be provided to Junker and Harris for their final determination. (Junker Dep. 208:5-209:4;, Peiper Dep. 57:20-59:10.) Peiper and Sheitman contributed to the mental health and behavioral health case reviews. (Peiper Dep. 59:11-60:8; Sheitman Dep. 27:23-30:21.) The Case Summary indicated that Mrs. Zayre-Brown had been deemed by the UNC Transhealth Program to be an appropriate candidate for "bottom surgery." (Ettner Rep., App. G, 1.) The summary further noted, "The patient's mood and anxiety symptoms appear well-controlled by psychiatric interventions, however, recent progress notes . . . indicate the patient has been heavily focused on the status of the final decision regarding her requested/desired surgery and experiencing related anxiety/frustrated mood." (*Id.* at 2.)

Despite his deference to the Medical Director's medical necessity analysis, Dr. Sheitman testified that, as of the February 17, 2022 DTARC meeting, Mrs. Zayre-Brown's treatment had been helpful but not sufficient, she was still dealing with some issues, and that surgery would have been helpful to manage her gender dysphoria. (Sheitman Dep. 101:14-102:2-11, 127:16-128:5-20.) He had no reason to disbelieve the reports of distress Mrs. Zayre-Brown was making to her mental health providers. (*Id.* 55:13-23, 64:8-13, 92:15-19, 94:14-5:25.) Similarly, Dr. Peiper testified that at the time of the DTARC meeting "[i]t continued to be confirmed" that Plaintiff suffered

clinically significant distress, depression, or anxiety associated with her gender dysphoria, and "that level of distress continued to exist." (Pieper Dep. 91:8-24, *see also* Peiper Depo. 49:10-14, 66:14-18.)

Dr. Campbell was the sole author of the Case Summary's medical analysis; he also conducted the attendant literature review. (Campbell 30(b)(6) Dep. 190:4-191:5, 193:9-16.) He admitted that his analysis was based largely on a "position statement" he drafted on his "concerns and considerations" regarding gender-affirming surgery; the position statement asserts that gender-affirming surgery is never medically necessary to treat gender dysphoria. (Ettner Rep., App. H; Campbell 30(b)(6) Dep. 215:2-15; Campbell Dep. 21:17-25, 69:5-70:18, 74:13-76:10, 77:15-80:11.)

The Case Summary provides minimal analysis with respect to Plaintiff herself, instead providing generalized assertions regarding gender-affirming surgery. (Ettner Rep., App. G, 2-5; Junker Dep. 221:3-224:15.) Contrary to the Fourth Circuit, other courts, and medical associations, *see supra* § B, Dr. Campbell concluded that the WPATH SOC are not evidence-based. (Ettner Rep., App. G, 3.) Dr. Campbell noted his view that some evidence suggests the suicide rate, as well as mortality and psychiatric hospitalization rates, increase among those who receive gender-affirming surgery. (*Id.* at 4.) In his deposition, however, Campbell testified that nothing caused him concern that Mrs. Zayre-Brown herself would experience increased suicidality or persistent or increased psychiatric morbidity or mortality if she received gender-affirming surgery. (Campbell Dep. 80:13-81:7; 81:23-82:3.)

Dr. Campbell also stated in his position statement that "[t]he phenomenon of

de-transition is critically important in considering treatment options for patients." (Ettner Rep., App. G, 4.) Dr. Campbell testified, however, that he has no reason to believe that Plaintiff would detransition or regret her vulvoplasty. (Campbell Dep. 82:4-82:25, 83:1-84:14.) Despite all this, he concluded: "[I]t remains my medical determination that the surgical procedure requested by this offender is not medically necessary." (Ettner Rep., App. G, 5.)

Upon reviewing DTARC's Case Summary, Junker and Harris did not have any concerns relating to prison safety, cost, or prison administration. (Harris Dep. 45:8-20; Junker Dep. 218:18-24.) Neither Junker nor Harris has ever met Mrs. Zayre-Brown. (Junker Dep. 229:19-23; Harris Dep. 21:4-7.) Junker and Harris testified that they deferred to the judgment of Campbell as to the medical necessity determination. (Junker Dep. 120:15-121:1, 126:6-16, 201:25-207:23; Harris Dep. 77:6-12, 78:12-16.) Despite that deference, Junker believes that Plaintiff being "stable from a mental health standpoint was a factor in favor of her being a good candidate for surgery." (Junker Dep. 113:5-9.) And he recognizes the "dilemma" presented by her needing to be stable to qualify for surgery but being considered *too* stable to require surgery. (*Id.* 226:12-228:2.)

In late April 2022, Mrs. Zayre-Brown received DTARC's latest denial of her request for gender-affirming surgery, and Junker and Harris's agreement with that. (Zayre-Brown Dec. ¶44, Ettner Rep., App. F, 6.) This lawsuit followed shortly thereafter. (DE 1.)

F. Without Gender-Affirming Surgery, Plaintiff's Gender Dysphoria Is Likely to Worsen

Plaintiff's pain is severe and ongoing. (2nd Zayre-Brown Dec. ¶¶4, 8.) It has been nearly six years since, in accordance with her preexisting treatment plan, she first requested gender-affirming surgery from DAC. While engaging in some activities geared toward education and re-entry, Mrs. Zayre-Brown has been largely fixated on seeking gender-affirming surgery and the disposition of those requests for the last several years. (First Zayre-Brown Dep. 153:7-20.)

Her providers and Defendants' experts agree that this preoccupation has impaired her ability to meaningfully engage with other aspects of her mental health. (Boyd Dep. 181:18-182:20; Penn Dep. 210:18-211:4; Ex. 23, Bowman Dep. 89:20-91:5; 118:5-21.) Dr. Hahn, the DAC clinician who provided mental health care to Mrs. Zayre-Brown from September 2018 until July 2021, believed that Mrs. Zayre-Brown would continue to experience gender dysphoria related to her genitals until she receives gender-affirming surgery. (Hahn Dep. 90:2-91:6, 94:19-95:1, 165:23-166:14, 167:12-17, 160:16-161:5, 193:17-194:24, 210:9-11.) She testified that during her time treating Mrs. Zayre-Brown, she believed gender-affirming surgery was necessary treatment from a mental health perspective. (*See id.* 156:24-158:14 ("mental health-wise, she might need [gender-affirming surgery] to live."); *see also* 146:20-147:17, 184:7-185:2, 211:11-16.) Dr. Marvella Bowman, a psychologist that treated Mrs. Zayre-Brown for a six-month period beginning in August 2021, testified that "based off of her knowledge of" Plaintiff, she could not imagine that Mrs. Zayre-Brown will stop experiencing gender dysphoria without surgery. (Bowman Dep. 31:14-19, 51:7-18, 118:25-120:13.)

Mrs. Zayre-Brown's expert witness, Dr. Randi Ettner, is a clinical and forensic psychologist with decades of experience in the evaluation, diagnosis, and treatment of gender dysphoria. (Ettner Rep. ¶¶4-6 & App. A.) After reviewing hundreds of pages of Mrs. Zayre-Brown's DAC health records, Dr. Ettner conducted an in-person evaluation of Mrs. Zayre-Brown on May 25, 2022. (*Id.* ¶80.) On January 9, 2023, Dr. Ettner conducted a follow-up phone consultation with Mrs. Zayre-Brown, during which Dr. Ettner assessed that Mrs. Zayre-Brown "appear[ed] increasingly despondent over DAC's lack of attention to her medical needs." (*Id.* ¶91.)

Dr. Ettner's evaluation of Mrs. Zayre-Brown found that DAC's treatment of Mrs. Zayre-Brown's gender dysphoria "falls far outside of what is recommended by the SOC." (*Id.* ¶92.) Dr. Ettner further concluded that Mrs. Zayre-Brown has "severe and persistent" gender dysphoria and continues to struggle with thoughts of self-harm as a result. (*Id.* ¶133.) Dr. Ettner found that Mrs. Zayre-Brown's previous treatments, "many of which have been inconsistently or inadequately provided by [DAC], have been ineffective in significantly alleviating or resolving" Mrs. Zayre-Brown's gender dysphoria, and that she "has met, and exceeded, all the requirements of the WPATH SOC for surgical intervention, which is medically necessary to treat her severe gender dysphoria." (*Id.* ¶¶133, 135.)

Dr. Ettner additionally found that Mrs. Zayre-Brown's resilience is "rapidly eroding," and that without surgery, her "gender dysphoria will continue to intensify, with no means of relief." (*Id.* ¶¶134-35.) Based on these findings, Dr. Ettner concluded that "Mrs. Zayre-Brown urgently requires gender-affirming genital surgery for the

treatment of her severe gender dysphoria." (*Id.* ¶136.) In concluding to the contrary, the DTARC overrode recommendations from DAC "healthcare providers with expertise in treating gender dysphoria . . . for non-medical reasons." (*Id.* ¶135.)

Plaintiff was promoted to minimum custody in March 2023 and transferred to Western Correctional Center for Women ("WCCW") in May 2023. (Ex. 24, 2nd Zayre-Brown Dec. ¶3.) After this Court issued its June 7, 2023 order on Defendants' Rule 35 motion, (DE 47), Defendant's expert Dr. Boyd conducted an examination of Mrs. Zayre-Brown at WCCW. Afterwards, Dr. Boyd agreed that gender-affirming surgery is "necessary" to cure Plaintiff's gender dysphoria, and that Plaintiff "cannot be cured of her gender dysphoria" while she continues to have male genitalia. (Boyd Dep. 166:21-25; 167:12-21). Similarly, Defendants' expert psychiatrist, Dr. Joseph Penn, testified that Plaintiff faces at least some ongoing risks of self-harm if she does not receive it. (Ex. 25, Penn Dep. 210:8-17.)

On September 20, 2023, Mrs. Zayre-Brown was transferred to the Center for Community Transitions' Center for Women—a program that allows individuals to finish their sentence in a more community-based setting in Charlotte. (2nd Zayre-Brown Dec. ¶¶1, 4.) Despite this move, Plaintiff continues to experience clinically significant distress from her gender dysphoria. (*Id.* ¶¶4, 8.)

LEGAL STANDARD

A plaintiff is entitled to summary judgment when there is no genuine dispute as to any material fact and she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court must review the evidence in the light most favorable to the

nonmoving party, but "a mere scintilla of evidence is not enough to create a fact issue[.]" *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984). Thus, summary judgment is appropriate where "the evidence is so one-sided that one party must prevail as a matter of law." *Tekmen v. Reliance Standard Life Insurance Company,* 55 F.4th 951, 959 (4th Cir. 2022) (quotation marks omitted). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

ARGUMENT

I. Defendants Are Violating the Eighth Amendment by Refusing to Provide Plaintiff with Medically Necessary Treatment—Prescribed by Specialists Defendants Selected—for Her Gender Dysphoria.

The state must "provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." *Brown v. Plata*, 563 U.S. 493, 511 (2011). These mandates apply to both mental and physical conditions. *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

To prove an Eighth Amendment claim for inadequate medical care, a plaintiff must demonstrate that (1) she has an "objectively serious condition," and (2) prison officials are "deliberately indifferent" to that condition, meaning they have subjective knowledge of it but refuse to provide adequate treatment. *De'lonta,* 708 F.3d at 525.

Where a prisoner's serious condition "is curable or may be substantially alleviated" through treatment, and delay or denial of such treatment creates substantial potential for harm, withholding that treatment constitutes deliberate indifference. *Bowring,* 551 F.2d at 47-48.

A. Mrs. Zayre-Brown's gender dysphoria is an objectively serious medical need.

A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008) (quotation marks omitted). The Fourth Circuit and many other courts have held that gender dysphoria is an objectively serious medical need. *See De'lonta,* 708 F.3d at 525-26; *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) (citing cases).

Here, Plaintiff's gender dysphoria is unquestionably an objectively serious medical need. Defendants confirmed Plaintiff's diagnosis, have referred her for treatment since 2017, and concede that she still suffers from that condition. (*Supra* n.7; Peiper Dep. 46:9-10, 91:16-24). By its own diagnostic criteria, gender dysphoria is characterized by "clinically significant distress or impairment." (*Id.*; Ettner Rep. ¶¶21, 23.) WPATH recognizes that some individuals will never experience relief from their gender dysphoria without surgery. (*Id* ¶48.) Dr. Ettner has concluded that Plaintiff's "resilience is rapidly eroding," and that, without surgery, her "gender dysphoria will continue to intensify, with no means of relief." (*Id.* ¶¶134-135.)

Accordingly, Plaintiff has established the objective element of her Eighth Amendment claim as a matter of law.

B. Defendants are deliberately indifferent because they continue to deny medically necessary treatment—prescribed by the providers Defendants chose—thereby prolonging Plaintiff's pain and creating risk of future harm.

Plaintiff must also demonstrate that Defendants are deliberately indifferent, meaning that they "actually know of and disregard an objectively serious condition, medical need, or risk of harm." *De'lonta*, 708 F.3d at 525 (quoting *Farmer v. Brennan,* 511 U.S. 825, 837 (1994)). Prison officials show deliberate indifference by "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 104-05. "A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain." *Sharpe v. S.C. Dep't of Corr.*, 621 Fed. App'x 732, 734 (4th Cir. 2015) (quotation marks omitted). Moreover, "[a]ccepted standards of care and practice within the medical community are highly relevant in determining what care is medically acceptable and unacceptable." *Edmo,* 935 F.3d at 786; *accord United States v. Derbes,* 369 F.3d 579, 583 (1st Cir. 2004).

In *De'lonta*, the Fourth Circuit explained that "sex reassignment surgery may be necessary for some individuals for whom serious symptoms persist [after hormone therapy and other treatment]. In these cases, the surgery is not considered experimental or cosmetic; it is an accepted, effective, medically indicated treatment. . . ." 708 F.3d at 523. The court held that providing *some* gender-affirming care, but refusing to provide gender-affirming surgery in accordance with the WPATH SOC, would violate the Eighth Amendment. *Id.* at 526.

Relying on *De'lonta,* the Ninth Circuit has held that providing hormone

therapy and mental health treatment to a patient with gender dysphoria, but refusing surgery despite serious ongoing distress violated the Eighth Amendment. *Edmo*, 935 F.3d at 793-94. The defendants' inaction was "based on inexplicable criteria far afield from the [WPATH SOC]," and the treatment offered fell "short of what was medically necessary." *Id.* at 794; *see also Iglesias v. Fed. Bureau of Prisons*, 2021 WL 6112790, at *22 (given plaintiff's history of threatened self-harm and the ineffectiveness of current treatment, refusal to provide surgery was likely deliberate indifference warranting injunctive relief).

Here, Plaintiff repeatedly informed Defendants of her need for gender-affirming surgery since 2017. Her medical records document her history of distress, anxiety, hopelessness, self-harm, and suicidal ideation, and multiple DAC mental health providers recommended gender-affirming surgery as a result. (*See supra* Statement of Facts § D.) Defendants testified to reviewing those records. (Campbell 30(b)(6) Dep.148:11-150:13, 169:17-175:8.). These facts support a finding of deliberate indifference. *See DePaola v. Clarke*, 884 F.3d 481, 488 (4th Cir. 2018) (finding deliberate indifference where prisoner "sought help repeatedly" for feelings of suicidality, agitation, depression, and "feelings of hopelessness" but was not provided care).

Lacking their own expertise in gender-affirming care, Defendants eventually arranged for Plaintiff to be evaluated by specialists at UNC. In accordance with the WPATH SOC, those providers determined that Plaintiff's treatment so far had not sufficed, and that gender-affirming surgery was medically necessary to cure or

significantly ameliorate her ongoing pain. (*See supra at* 14-15.) Dr. Figler believed at the time of his examination that surgery was necessary for Mrs. Zayre-Brown "because she had already socially transitioned and received all other endocrinological and surgical treatments without elimination of her gender dysphoria. (Figler Dec. ¶11.) He notes that he has "no reason to believe that gender affirming genital surgery is no longer medically necessary for Mrs. Zayre-Brown." (*Id.* ¶12.) Dr. Caraccio believed that Plaintiff's gender dysphoria was "chronic in nature" the entire time she was his patient-- from July 2020 until May 2023—and that "[b]ased on his education, experience, clinical interactions with Mrs. Zayre-Brown as her provider, review of her medical records and evaluation according to the WPATH Standards of Care," "gender-affirming vulvoplasty is medically necessary for the treatment of Mrs. Zayre-Brown's gender dysphoria." (Caraccio Dec. ¶¶ 10, 21-22.)

Plaintiff's expert, Dr. Ettner, agrees with the providers engaged by Defendants. She concluded that Mrs. Zayre-Brown's gender-affirming surgery is medically necessary, and her gender dysphoria will only worsen without it. (*See supra* at 20-22.) Even Defendants' expert psychologist, Dr. Boyd, agrees that gender-affirming surgery is "necessary" to cure Plaintiff's gender dysphoria. (Boyd Dep. 166:21-25; 167:12-21.)

Despite this broad expert agreement on the need for surgery, Defendants continue to deny it. That determination relied on Defendant Campbell, who has no expertise or experience in evaluating a patient for gender-affirming surgery. (Campbell Dep. 5:17-6:23, 7:22-11:23, 13:4-14:2.) Dr. Campbell's analysis rejects the

WPATH SOC, which are widely endorsed by medical associations that DAC medical providers ordinarily look to for guidance. (Ettner Rep., App. G, 3; Campbell 30(b)(6) Dep. 28:4-29:1, 35:1-10, 51:5-16, 52:22-54:10.) Dr. Campbell similarly rejected the conclusions of the specialists in gender dysphoria to whom DAC referred Plaintiff. (Campbell 30(b)(6) Dep. 169:17-175:8.) Dr. Campbell broadly discusses insurance coverage of gender-affirming surgery as demonstrating a lack of medical necessity, but ignores that, if Mrs. Zayre-Brown were not incarcerated, and had private or state employee health coverage in North Carolina, gender-affirming surgery would be a covered procedure. (Ettner Rep. ¶¶108-110; 2nd Zayre-Brown Dec. ¶7; *Kadell, supra*).

Moreover, despite Defendants' view that evaluations for gender-affirming surgery should occur on a case-by-case basis, Dr. Campbell's analysis specific to Mrs. Zayre-Brown was cursory.[10] (Ettner Rep., App. G, 2-5; Campbell Depo. 87:20-88:3 (Dr. Campbell has never met nor spoken to Plaintiff.)). Dr. Campbell identified no risks that she specifically would experience from gender-affirming surgery. Dr. Junker could not identify any either, and admitted that the DTARC recommendation "doesn't go into specifics." (Junker Depo. 221:3-224:15.) And even though mental stability is a WPATH prerequisite for surgery, (WPATH SOC 7 at 105-06), Dr. Campbell concluded that Plaintiff's stability cut *against* medical necessity, putting Plaintiff in an impossible catch-22 where she can never qualify for surgery under the WPATH SOC

[10] If Dr. Campbell purports to rely on the mental health opinions rendered by Drs. Peiper and Sheitman, their reviews were similarly cursory—neither has ever met nor treated Mrs. Zayre-Brown, and their consideration of her case consisted only of medical records review. (Peiper Dep. 62:11-17; Sheitman Dep. 46:12-15.)

or must become even more seriously ill to satisfy Dr. Campbell. *See Gordon v. Schilling,* 937 F.3d 348, 359 (4th Cir. 2019) ("[I]t is inconsistent with the Eighth Amendment for a prison official to withhold treatment from an inmate who suffers from a serious, chronic disease until the inmate's condition significantly deteriorates.").

In sum, Defendants have long known of Plaintiff's gender dysphoria and the inadequacy of her prior treatment.[11] *See Cooper v. Dyke,* 814 F.2d 941, 945 (4th Cir. 1987) ("Government officials who ignore indications that a prisoner's . . . initial medical treatment was inadequate can be liable for deliberate indifference to medical needs."). A reasonable trier of fact could only conclude that Defendants have rejected the authoritative medical standard of care and are "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 104-05. And that medically-necessary treatment was prescribed by specialists who Defendants themselves chose to evaluate Plaintiff. *See Iglesias*, 2021 WL 6112790, at *23 (granting relief where "specialists in gender dysphoria would all agree that [plaintiff] needs [gender-affirming surgery]"). Even Defendants' own experts in this case testified that surgery is necessary and that Plaintiff faces risks of harm without it. Defendants rationale for denying surgery, on the other hand, is not informed by any expertise, relevant experience, or clinical

[11] Where injunctive relief is sought, deliberate indifference "should be determined in light of the prison authorities' attitudes and conduct at the time suit is brought and persisting thereafter." *Farmer*, 511 U.S. at 845. Defendants cannot "plausibly persist in claiming lack of awareness" to facts presented during litigation. *Id.* at 847 n.9.

guidelines.

Thus, there can be no doubt that withholding this treatment will continue to "unnecessarily prolong[]" Plaintiff's pain. *Sharpe*, 621 Fed. App'x at 734. Defendants are therefore deliberately indifferent as a matter of law.

C. Denying surgery does not serve any state interest.

Prison officials can justify an "objective risk of serious emotional and psychological harm" if it "is necessary to protect the well-being of prison employees, inmates, and the public or to serve some other legitimate penological objective." *Porter v. Clarke,* 923 F.3d 348, 363 (4th Cir. 2019). Here, Defendants conceded that concerns about cost, security, or prison administration did not affect their decision to deny surgery. (*See* Defs. Interrog. Resp. at 6) (noting Defendants "have not denied or deferred" surgery because of safety, security, administrative burden, and/or cost"); Harris Depo. 45:8-20 (Harris has never denied gender affirming surgery for reasons related to prison safety, cost, prison administration, or "reasons not having to do with medical necessity").)

II. Defendants Are Liable Under Article I, Section 27 of the North Carolina Constitution.

Defendants are liable to Plaintiff for damages as a matter of law under the state Constitution. The North Carolina Supreme Court has held that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. UNC*, 413 S.E.2d 276, 289 (N.C. 1992). To be adequate, a state remedy must provide "the possibility of relief under the circumstances." *Craig ex rel. Craig v. New Hanover*

Cnty. Bd. of Educ., 678 S.E.2d 351, 355 (N.C. 2009). Without such a remedy, plaintiffs may bring a constitutional claim for both damages and equitable relief against official-capacity defendants. *Id.* at 355.

Under the State Tort Claims Act, prisoners may sue the State for ordinary negligence in the Industrial Commission. N.C. Gen. Stat. § 143-291. But that tribunal lacks jurisdiction over "allegations of gross negligence and wanton, reckless and malicious conduct[.]" *Collins v. N.C. Parole Comm'n*, 456 S.E.2d 333, 336 (N.C. Ct. App. 1995). Here, Plaintiff brings claims involving deliberate indifference—a more demanding standard akin to recklessness. *Farmer*, 511 U.S. at 836. Therefore, a negligence suit in the Industrial Commission is not an "adequate state remedy" because Plaintiff's claims would be jurisdictionally barred there—she cannot allege these same facts showing reckless or intentional misconduct and simply call it a negligence claim. *See Jarvis v. Joyner*, No. 1:14CV254, 2020 WL 956801, at *6 n.2 (M.D.N.C. Feb. 27, 2020) ("Plaintiff could not have asserted his § 1983 claims [of Eighth Amendment deliberate indifference] before the Industrial Commission."); *Taylor v. Wake Cnty.*, 811 S.E.2d 648, 656 (N.C. Ct. App. 2018) (a plaintiff may bring a direct constitutional claim if "her Industrial Commission claims are impossible"). Accordingly, Plaintiff has no adequate state law remedy and may sue official-capacity Defendants directly for damages under the state Constitution.

Article I, Section 27 of the state Constitution prohibits "cruel or unusual punishments." This provides at least the same level of protection as the Eighth Amendment, and in some contexts may provide greater protection. *State v. Kelliher*,

2022-NCSC-77, ¶¶48, 51. Because the North Carolina appellate courts have not decided whether a Section 27 challenge to prison conditions requires a showing of deliberate indifference, Plaintiff assumes that the deliberate indifference requirement applies.

As explained above, Defendants became liable to Plaintiff when—despite their own knowledge of Plaintiff's suffering and the recommendations of the health care specialists Defendants selected—they denied Plaintiff treatment based on a completely unsound rationale. Therefore, Defendants are liable to Plaintiff as a matter of law on this claim, with the amount of damages to be determined at trial.

III. Defendants Have Refused to Provide Mrs. Zayre-Brown with Medical Care Because of her Disability, Gender Dysphoria, in Violation of the ADA.

The Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.*, "prohibits public entities from discriminating against or excluding from participation in the benefits or services, programs, and activities, any qualified individual with a disability." *Williams v. Kincaid,* 45 F.4th 759, 766 (4th Cir. 2022), *cert denied*, 600 U.S. ____ (2023).[12] Plaintiff is entitled to summary judgment on her ADA claim against DAC because the evidence demonstrates that: 1) she has a disability; 2) she is otherwise qualified for a government benefit or service; but 3) she was excluded from that benefit or service on the basis of her disability. *Lewis v. N.C. Dep't of Pub. Safety*, No. 1:15-CV-284-FDW, 2018 WL 310142, at *11 (W.D.N.C. Jan. 4, 2018).

A. Gender dysphoria is a disability under the ADA.

[12] Defendants admit that NC DAC is a state agency (Doc. 26 ¶ 15), and as such it constitutes a public entity for purposes of the ADA.

Disability is construed broadly under the ADA as a physical or mental impairment that substantially limits one or more major life activities." *See Williams,* 45 F.4th at 766; 42 U.S.C. 12132. The Fourth Circuit recently held that "nothing in the ADA . . . compels the conclusion that gender dysphoria constitutes a 'gender identity disorder' excluded from ADA protection." *Id*. at 769. The Fourth Circuit also recognized the disabling nature of the clinically significant distress inherent in gender dysphoria. *Id.* at 768 (noting that "if a transgender person does not experience '*clinically significant* distress' she could not be diagnosed as having gender dysphoria under the DSM-5" and characterizing such distress itself as a "disabling symptom").

As noted above, it is undisputed that Plaintiff suffers from gender dysphoria, which causes stress, anxiety, panic attacks, self-harm, and suicidal ideation. (*Supra* at 10-16 & n.7.) Plaintiff's gender dysphoria has prevented her from participating in social, recreational, and other major life activities, and has caused her to fixate on the receipt of care to the exclusion of other important concerns. (*Supra* at 20; Zayre-Brown Dep. 49:8-50:23). Accordingly, Plaintiff's gender dysphoria is a disability for purposes of the ADA.

B. Plaintiff was denied a government service—prison medical care—because of her disability.

DAC discriminates against prisoners with gender dysphoria as a condition because it sharply deviates from typical policies in practices in its treatment and have denied Mrs. Zayre-Brown treatment on the basis of her disability.

The medical care that Plaintiff seeks from DAC is a government service for

purpose of the ADA. *See Doe v. Pa. Dep't of Corr.*, 2021 WL 1583556, at *12 (citing *Pa.. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998)). Prison officials discriminate in violation of the ADA where, as here, they deny a prisoner disability-related medical care, but provide care to other prisoners for other conditions or disabilities. *See United States v. Georgia*, 546 U.S. 151, 157 (2006) (observing that denial of "disability-related . . . medical care" may violate ADA); *Doe,* 2021 WL 1583556, at *13 (alleged denial of care for gender dysphoria stated plausible ADA claim); *Lewis*, 2018 WL 310142, at *11 (same for denial of hepatitis C treatment); *see also Lonergan v. Fla. Dept. of Corrections*, 623 Fed. Appx. 990, 994 (11th Cir. 2015) (failure to provide prisoner treatment prescribed by prisoner's doctor states a prima facie ADA claim).

DAC admits that its clinicians provide surgeries that could qualify as gender-affirming surgery whenever medically indicated for conditions other than gender dysphoria, including genital reconstruction surgery. (Campbell 30(b)(6) Dep. 144:2-19.) While DAC generally employs uniform protocols to treat all other conditions and seeks to provide community-consistent care, it has created exceptions and created obstacles that exist only for individuals suffering from gender dysphoria. (*Supra* at 6-10.)

DAC policy requires that clinicians look to clinical practice guidelines from professional medical associations to establish the standard of care. But for gender dysphoria, DAC's chief medical officer has chosen to disregard the authoritative clinical practice guidelines to justify his position that gender-affirming surgery is not medically necessary as a general matter. (Campbell 30(b)(6) Dep. 28:4-29:1, 35:1-10,

51:5-16, 52:22-54:10; Ettner Rep., App. G, 3.) That is a discriminatory starting position, from which DAC has never deviated. (Campbell 30(b)(6) Dep. 135:18-136:10 (DTARC has never approved gender-affirming surgery as medically necessary, and nobody in DAC custody has ever received gender-affirming surgery for the treatment of gender dysphoria).)

Had Mrs. Zayre-Brown sought care for any other condition or disability, she would have received individualized consideration in accordance with typical DAC protocols—but because she sought treatment for gender dysphoria disability, her process was prolonged, her consideration was cursory, and her denial was all-but preordained. Accordingly, this Court should grant Plaintiff's motion for summary judgment as to her ADA claim.

CONCLUSION

The Court should grant Plaintiff's motion and order Defendants to immediately arrange for her to have gender-affirming surgery as recommended by the specialists Defendants sent her to at UNC.

Respectfully submitted this 5th day of October 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2023, I electronically filed the foregoing document using the ECF system which will send notification of such filing to all counsel of record.

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